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No. 15-474

In The Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMICUS BRIEF OF FORMER VIRGINIA ATTORNEYS GENERAL IN SUPPORT OF PETITIONER

William H. Hurd
Counsel of Record
Stephen C. Piepgrass
C. Reade Jacob, Jr.
TROUTMAN SANDERS LLP
1001 Haxall Point
Post Office Box 1122
Richmond, Virginia 23219
(804) 697-1200 (Telephone)
(804) 697-1339 (Facsimile)
william.hurd@troutmansanders.com

Counsel for Amici Curiae
Andrew P. Miller, Anthony F. Troy,
J. Marshall Coleman, Mary Sue Terry,
Stephen D. Rosenthal, and
Mark L. Earley

March 7, 2016

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
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RULE

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Six former Attorneys General of Virginia – Republican and Democratic – respectfully submit this brief to the Court as *amici curiae* in support of the Petitioner, Governor Robert F. McDonnell.[1]

INTERESTS OF *AMICI*

This brief is submitted by the following former Attorneys General of Virginia:

- Andrew P Miller (D) (1970-77)
- Anthony F. Troy (D) (1977-78)
- J. Marshall Coleman (R) (1978-82)
- Mary Sue Terry (D) (1986-93)
- Stephen D. Rosenthal (D) (1993-94)
- Mark L. Earley (R) (1998-2001)[2]

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting this brief. No person – other than Amici and their counsel – contributed money intended to fund preparing or submitting this brief. *See* U.S. Supreme Court Rule 37(6). Both petitioner and respondent have filed with the Court blanket written consents to the filing of amicus curiae briefs. Petitioner's consent was filed February 10, 2016; respondent's consent was filed February 12, 2016.

[2] These six Amici include all living former Attorneys General of Virginia, other than those (i) who are now serving as jurists in the Commonwealth, or (ii) who represent (or have represented) parties with interests in this case, or (iii) who, because of their subsequent service as Governor, are not perceived as speaking principally as former Attorneys General.

While we held the office of Attorney General, we were charged with a variety of duties, including providing legal advice to the Governor of Virginia. This duty included providing any necessary advice related to the meaning of federal statutes potentially affecting a Governor's conduct in office. In addition, we were intimately involved in the public life of Virginia, understood its workings and actively engaged with citizens who sought to make their concerns heard by candidates and officeholders. Today, we have a continuing interest in promoting the orderly and fair application of the law, the conduct of government on sound and predictable principles, and broad participation in the democratic process.

We support the reversal of Gov. McDonnell's convictions – and the dismissal of the criminal charges – because the expansive interpretation of federal law under which he was prosecuted – and on which his convictions were based – is erroneous. *It is completely alien to any legal advice that any of us would have given to any Governor of Virginia.* Moreover, that expansive interpretation, if allowed to stand, would wreak havoc upon participatory democracy by casting a shadow of federal prosecution and imprisonment across normal participation in the democratic process. This is a matter closely touching the common interest of the *Amici* in participatory democracy.

SUMMARY OF ARGUMENT

Gov. McDonnell's convictions are based on alleged violations of the Hobbs Act and the honest

services statute which, in a nutshell, prohibit a *quid pro quo* arrangement in which a public official is given something of value (the *quid*) in exchange for an "official action" (the *quo*).

Gifts to public officials usually take the form of campaign contributions, not the personal gifts shown here; however, that distinction is *not* relevant for purposes of these federal statutes. *See, e.g.*, *United States v. Derrick*, 163 F.3d 799, 816-17 (4th Cir. 1998) ("[C]ampaign contributions may be the subject of a Hobbs Act violation, no less than any other payments."). Thus – and this is key – the nature of the *quid* does not change what constitutes a *quo*. *The sorts of actions at issue here either are – or are not – "official actions" whether they are allegedly linked to campaign contributions or to anything else of value.*[3] This important point appears to have been lost on the Fourth Circuit. Thus, the decision below creates a very dangerous environment for public officials who receive campaign contributions and for citizens who give them.

Gov. McDonnell was convicted – and the convictions were affirmed – based on an overly-

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[3] As former Attorneys General, we recognize that some of the gifts at issue here may give the appearance of impropriety, but that is a different issue from whether there has been a violation of those federal laws that are purportedly the basis for the conviction. Moreover, without prejudging their potential application here, we note that Virginia already has in place statutes that address situations where gifts to an officeholder create an appearance of impropriety. *See* Va. Code § 2.2-3103(8) and (9). The expansion of federal law undertaken by the district court and court of appeals is as unnecessary as it is unwarranted.

expansive interpretation of "official action." Four important legal doctrines demonstrate the error: (i) the rule of lenity, (ii) the stringency required where a statute implicates speech, (iii) the need for absolute clarity before altering the federal-state balance, and (iv) the need to avoid unreasonable results.

The overly-expansive interpretation of "official action" in the decision below will disrupt the public life of Virginia and, indeed, the public life of the nation if endorsed by this Court.

ARGUMENT

I. The Convictions Rest Upon An Overly-Expansive Interpretation Of What Constitutes An "Official Action."

The statutes under which Gov. McDonnell was convicted require the performance of an "official action." *Evans v. United States*, 504 U.S. 255, 268 (1992) (noting that, to prove a violation of the Hobbs Act, the government must show "that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts").

To the layman, almost everything associated with a Governor may be viewed as "official" in one sense or another. The Executive Mansion is the Governor's "official" residence. Any luncheon or dinner held there is an "official" event (regardless of who pays for it). A photograph of the Governor posing with a citizen for a handshake is an "official"

photograph, and those businessmen who accompany a Governor on an overseas trade mission are his "official" guests (even though they pay they own way).

Given the very broad – virtually unbounded – meaning of the word "official" when laymen speak about a Governor, it was essential for the trial court to have given the term "official action" a very specific definition and to have drawn clear boundaries around the term. Yet, the district court failed to do so, and that failure has now been endorsed by the court of appeals.

A Governor clearly would be violating federal law (and state law) if, in exchange for something of value, he were, for example, to make a board appointment, or offer a government job, or promulgate an executive order, or award a state contract, or expend public funds, or approve the adoption of a regulation, or sign or veto legislation. All of these are clearly "official actions" within the meaning of these federal statutes, because they involve the actual exercise of government power. As Attorneys General, we would have quickly and emphatically said so.

But, the convictions here are not based on any evidence – or any theory – that Gov. McDonnell did any of these things, or anything similar. Instead, the district court gave jury instructions that defined "official action" far more broadly, so as to encompass various actions that are not part of any official duties, but that fall within the broad sweep of the indictment, for example: (i) ***arranging meetings*** for

Jonnie Williams with Virginia government officials; (ii) ***hosting and attending*** events at the Governor's mansion in order to ***encourage*** Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors; (iii) ***contacting*** other government officials to ***encourage*** Virginia state research universities to initiate studies of anatabine; (iv) ***allowing*** Jonnie Williams to ***invite*** individuals important to Star Scientific's business to exclusive events at the Governor's mansion; and (v) ***recommending*** that senior government officials ***meet*** with Star Scientific executives. ***See*** Indictment, ¶ 111(c), Supp.JA.47-48.

Endorsing this misguided approach, the Fourth Circuit found "official actions" in the most mundane and innocuous of activities: "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue." Pet.App.73a. In other words, in the Fourth Circuit, it is now an "official act" within the meaning of federal bribery law if a public official tells a staffer simply to go and listen to what a constituent has to say, or asks a question of an academic researcher, or calls for a staffer simply to meet with him on a matter of interest to a constituent. This wholly undermines the concept of "access" that this Court has said lies beyond the reach of federal anti-corruption statutes. Indeed, the Fourth Circuit went so far as to find an "official act" – and corruption – in Gov. McDonnell's statement about his own *personal* use of Anatabloc and his suggestion that others in the workforce might benefit from it as well. Pet.App.74a.

As Attorneys General, none of us would have concluded that any of these actions – all involving access or speech – constitute "official actions" within the meaning of the federal statutes used by prosecutors here. We believe the Fourth Circuit's expansive view of "official actions" is in error. By affirming Gov. McDonnell's misplaced convictions, the Fourth Circuit not only erred, it threw into disarray the previously understood distinction between lawful and unlawful influence.

Our views on the reach of these federal statutes are informed by four important principles of statutory construction:

The Rule of Lenity:

As Attorneys General, we were – and are – acutely aware of the importance of giving fair notice as to what the criminal law prohibits. Fair notice is a component of constitutional due process, and it is often manifested in "the rule of lenity," which is the long-established practice of resolving questions concerning the ambit of a criminal statute in favor of the defendant. This rule is "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979) (citations omitted).[4]

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[4] The rule of lenity is especially important where an expansive reading of the criminal statutes would expose the accused to the crushing penalties that were possible here: eleven criminal counts, each carrying a possible prison term of twenty years.

In our view, the interpretation of law on which the convictions are based violates the rule of lenity because it blurs the line between (i) taking an "official action," to which these federal statutes apply, and (ii) granting or facilitating access to government officials, which this Court has repeatedly held does not constitute official action. *E.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010) ("[i]ngratiation and access are not corruption"). All five "official actions" alleged in the indictment appear to us as nothing more than granting or facilitating access.

If such acts can form the basis for Gov. McDonnell's convictions, it will be anyone's guess as to where the line between lawful and unlawful acts might be drawn. There will be no fair notice as to what the law prohibits. The rule of lenity will be violated. Indeed, the application of these federal statutes to the conduct of Governor McDonnell is so sudden and surprising as to render that application a violation of the constitutional guarantee of due process.

Last year, this Court struck down a provision of the Armed Career Criminal Act because that provision was unconstitutionally vague. *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551, 2557 (2015). The rationale of that decision has direct implications here. At issue in *Johnson* was language that provided enhanced punishment for criminal defendants having three or more earlier convictions for a "violent felony." That term was defined as including not only various specific felonies but also any crime falling within the statute's broad final

category – *i.e.*, any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 2556 (citing 18 U.S.C. § 924(e)(2)(B)). The Court held that this "residual clause" was unconstitutionally vague because it "leaves *grave uncertainty* about how to estimate the risk posed by a crime." *Id.* at 2557 (emphasis added).

Under the approach followed by the courts below, the federal statutes applied to Gov. McDonnell likewise leave "grave uncertainty" as to what constitutes an "official action." Under previous case law, "official actions" were limited to instances where the officeholder either *exercised* or *pressured* others to exercise *actual sovereign power*. *See* Pet. Br. at 26. But, the Fourth Circuit's decision erases that bright line, leaving the officeholder to guess where the new line is to be drawn.

While the Fourth Circuit talks about "the customary and settled practices of an office," Pet.App.54a, that phrase is fraught with uncertainty. Without a statutory definition, it is impossible to know in advance precisely what will constitute a "practice" or the level of generality at which a "practice" will be judicially defined or what the elements of a particular "practice" will be. And, even if a "practice" could be defined with enough precision to pass constitutional muster, there still would be no way to know when a practice has acquired the characteristics of being "customary" and "settled."

As *Johnson* reaffirmed: "The prohibition of vagueness in criminal statutes is a well-recognized requirement and a statute that flouts it violates the first essential of due process." ___ U.S. at ___, 135 S. Ct. at 2556-57 (internal quotation marks and citations omitted). As construed below, the federal statutes used to convict Gov. McDonnell are so vague as to violate the constitutional requirements of due process.

Moreover, this Court has long recognized that, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909)). Thus, even if the federal statutes implicated here were susceptible of the expansive construction placed upon them by the courts below (and the *Amici* believe they are not), this Court should reject that construction in favor of a narrow one, overturn the convictions and dismiss the charges.

The First Amendment:

The need for fair notice is especially acute here because at least some of the actions alleged in the indictment – and for which Gov. McDonnell was

convicted – fall within the category of ***speech***.[5] Despite the constitutional protections afforded to speech, the Fourth Circuit adopted a very expansive view of when speech by a public official is an "official action" and punishable as corruption. In explaining its decision to affirm the convictions, the Fourth Circuit cited the following evidence:

> "[T]he Governor is the Chief Executive of the Commonwealth. He has this bully pulpit, if you will, to go out and talk about issues."
>
> * * * * *
>
> When "the Chief Executive of the Commonwealth embraces the worthiness of a product[,] [i]t gives it a type of credibility."
>
> * * * * *
>
> [T]he opportunity to "showcase" a product at the Governor's mansion "automatically" imbues the product with "credibility"

Pet.App.70a-71a (quoting witness testimony).

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[5] Speech by a public official is within the ambit of the First Amendment, at least where there is no verbal act involving the actual exercise of governmental power. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Wood v. Georgia*, 370 U.S. 375 (1962).

Any statute that purports to prohibit such speech must be interpreted and limited in light of First Amendment jurisprudence. As Attorneys General, we understood full well that any statute restricting speech must be absolutely clear in what it prohibits. *E.g.*, *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) ("If ... the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."). This principle applies here.

The issue is not whether Congress *could* prohibit an elected official from favoring a contributor with the sort of speech described in the indictment or in the opinion below. That is an issue for another day. The point is that, if Congress is to impose such a prohibition on speech, it may do so only through a statute that leaves no doubt about its meaning. As applied by the district court and court of appeals, the federal statutes at issue are too vague to pass such a test. This Court should rule in favor of Gov. McDonnell in order to vindicate the important First Amendment principles jeopardized by the decision below.

Federalism:

The federal statutes at issue here derive their legitimacy not from some general power of Congress to enact ethics rules for state officials (no such power exists), but from the power of Congress to regulate interstate commerce. *See, e.g.*, *Scheidler v. NOW, Inc.*, 547 U.S. 9, 17-18 (2006) (noting that the Commerce Clause granted Congress the authority to enact the Hobbs Act). Even so, these statutes

obviously are not ordinary Commerce Clause regulations. They threaten to punish state officials, including state governors, for certain actions while in office, thereby taking responsibility for such matters away from the States. As such, these statutes alter the federal-state balance.

"If Congress intends to alter the usual constitutional balance between the state and federal governments, it must make its intention to do so *unmistakably clear* in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (emphasis added) (internal quotation marks and citations omitted). "Congress should make its intention *clear and manifest* if it intends to pre-empt the historic powers of the States." *Id.* at 461 (emphasis added) (internal quotation marks and citations omitted). Indeed, "[i]nasmuch as [the Supreme] Court has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be *absolutely certain* that Congress intended such an exercise." *Id.* at 464 (emphasis added). *See also United States v. Enmons*, 410 U.S. 396, 411-12 (1973) ("We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.").

The expansive interpretation of "official actions" on which the convictions are based cannot meet this rigorous standard. It is neither "unmistakably clear" nor "clear and manifest" that Congress intended to punish the sorts of activities described in the indictment. Nor can the Court be

"absolutely certain" that Congress intended such a result, or that Congress sought to effect such microscopic criminal oversight into the actions of a state governor. The convictions must not stand.

Avoiding Unreasonable Results:

As former Attorneys General who often issued opinions interpreting statutes, we are mindful of the canon of construction that seeks to avoid unreasonable results. *See, e.g., Webster v. Reprod. Health Servs.*, 492 U.S. 490, 515 (1989) ("the law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression."). The Fourth Circuit's overly-expansive interpretation of federal law would violate this canon by casting a shadow of federal prosecution and imprisonment across normal participation in the democratic process.

II. The Overly-Expansive Interpretation Of "Official Action" In The Decision Below Would Wreak Havoc On The Public Life Of Virginia And The Nation.

As noted earlier, what constitutes an "official action" does not change based on the nature of the contribution given to the officeholder. Whatever definition is applied here also must apply in future cases where the gifts are fully-reported contributions of campaign funds. If the acts at issue here constitute "official actions" of the Governor for purposes of federal criminal law, then *any* favorable and customary treatment by an officeholder –

including meeting with a citizen or a simple nod of approval – would constitute "official actions" as well. This would pose serious problems both for the officeholder and the citizen.

Living under such a restrictive regime, future Attorneys General would be well-advised to counsel their Governors to abstain from *any* favorable treatment of *any* campaign contributor, lest they risk being accused of having engaged in a *quid pro quo* transaction in violation of federal law. This would have far-reaching consequences affecting many actions in which Governors customarily have engaged. It would affect, for example, whom Governors can invite into their home, the Executive Mansion; what personal introductions they can facilitate; whom Governors can invite on trade missions; and whom they can meet to discuss government business.

The interpretation of "official action" reflected in the jury instructions and decision below implicitly includes all such customary activities and, thus, subjects the officeholder to the risk of federal prosecution if favoritism is shown to a contributor. Such results are "unjust, absurd [and] unreasonable." *Webster*, 492 U.S. at 515.

Moreover, these federal criminal statutes apply not just to the *officeholders* who received the contributions; they apply as well to the *citizens* who

gave them.[6] The expansive interpretation of those statutes by the court of appeals will chill the exercise by citizens of their First Amendment rights to participate in the democratic process. Such a result, if not overturned by this Court, would wreak havoc on the public life of this nation.

Finally, the decisions of at least three other circuits – the First, Eighth and D.C. Circuits – have drawn far different lines from the Fourth Circuit in terms of what constitutes "official action" for purposes of federal anticorruption statutes. *See United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008) (drawing distinction between actions that invoke *official powers* and those that merely trade on the *reputation and prestige* of those holding public office); *United States v. Rabbitt*, 586 F.2d 1014 (8th Cir. 1978) (drawing distinction between *affording access* to those who can make a decision and *trying to control* the ultimate outcome); *Valdez v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (*en banc*) (drawing distinction between an informational inquiry about a matter and inappropriate influence on another governmental decision maker). Under the standards applied by these other three circuits, Gov. McDonnell could not have been convicted. This Court should adopt the approach followed by those three circuits and reject the approach followed by the courts below.

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[6] While federal prosecutors gave Jonnie Williams (their chief witness and the purported "briber") complete immunity, the next contributor who receives access from a public official may not be given such favored treatment.

CONCLUSION

The judgment below should be reversed and the criminal charges dismissed.

Respectfully submitted,

ANDREW P. MILLER,
ANTHONY F. TROY,
J. MARSHALL COLEMAN,
MARY SUE TERRY,
STEPHEN D. ROSENTHAL, and
MARK L. EARLEY

By: /s/ William H. Hurd

March 7, 2016

William H. Hurd (VSB No. 16967)
Counsel of Record
Stephen C. Piepgrass (VSB No. 71361)
C. Reade Jacob, Jr. (VSB No. 87660)

TROUTMAN SANDERS LLP
1001 Haxall Point, P.O. Box 1122
Richmond, Virginia 23219
Telephone: 804.697.1200
Facsimile: 804.697.1339
Email: william.hurd@troutmansanders.com